STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2013
v	No. 310704 Wayne Circuit Court
JOHN EDWARD JONES, Defendant-Appellant.	LC No. 11-007861-FC

Before: WILDER, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, two counts of assault with intent to commit murder, MCL 750.83, firearm possession by a felon, MCL 750.224f, and possessing a firearm while committing a felony (felony firearm), MCL 750.227b. He was sentenced to serve 40 to 60 years for second-degree murder, 18 to 60 years for assault with intent to commit murder, 8 to 20 years for firearm possession by a felon, and two years for felony firearm. Defendant appeals by right, and we affirm.

I.

The prosecution alleged that defendant was one of three gunmen who attacked three men sitting in a parked car. The assailants collectively fired a total of at least 50 rounds of ammunition into the vehicle in which Willie Shelby, Steven Mingo, and Will Grimsley were sitting. Mingo died from multiple gunshot wounds, while Shelby and Grimsley, despite each sustaining multiple gunshot wounds, survived the incident.

At trial, Shelby testified that he had known defendant most of his life, could see defendant's face clearly as he exited the vehicle, and recognized defendant immediately. Shelby testified at trial that even though he had initially withheld information from police regarding the shooters' identities, it was only because he was afraid that if he revealed to police the assailants' identities, they would "find [him] and probably finish killing [him]."

It was not until approximately one month after the shooting that Shelby changed his mind and decided to "come clean" and tell police that defendant had been one of the shooters. Shelby identified defendant by name to police. Shortly after doing so, Shelby was shown a photo lineup, from which he immediately picked out a photo of defendant.

II. HEARSAY

Defendant first argues that the trial court erroneously excluded on hearsay grounds prior statements made by Shelby. Defendant claims that Shelby's testimony at the preliminary examination should have been admitted at trial pursuant to either MRE 613(b), MRE 801(d)(1)(A), or MRE 801(d)(1)(C). He also argues that evidence of statements Shelby allegedly made to another individual after the shooting should have been admitted under MRE 801(d)(1)(C).

A trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Fomby*, 300 Mich App 46, 48; 831 NW2d 887 (2013).

Hearsay evidence generally is not admissible. MRE 802. Hearsay is an out-of-court statement that is "offered in evidence to prove the truth of the matter asserted." MRE 801(c). Under MRE 801(d)(1), a statement is not hearsay if the declarant testifies and is subject to cross-examination and the statement is "(A) inconsistent with the declarant's testimony, and was given under oath," or "(B) consistent with the declarant's testimony and is offered to rebut . . . [a] charge against the declarant of recent fabrication or improper influence or motive," or "(C) one of identification of a person made after perceiving the person." MRE 613(b) provides for the introduction of extrinsic evidence of prior inconsistent statements of witnesses for impeachment purposes.

At the preliminary examination, Shelby testified that he had recognized defendant at the time of the shooting, but that he initially withheld that and other pieces of identifying information from police for fear of reprisal from his attackers. Shelby further testified that when he heard from a third party some weeks after the shooting that defendant was looking for him anyway, he decided to "come clean" and identify defendant to police as one of his attackers. When asked if the third-party information Shelby received after the shooting, as opposed to what he had directly perceived during the incident, was in fact what first led him to believe defendant was involved in the shooting, Shelby responded unequivocally that it was not.

At trial, Shelby responded to the same accusation in the same way. He testified as follows:

> *Q.* All right. And the fact of the matter is when you went in, the reason you went in is not so much that you were gonna come clean on supposedly telling who you saw up there, but it's because you heard the word on the street was that my client, Mr. Jones or John-John, had something to do with this; isn't that correct, sir?
>
> *A.* No, that is not correct. The reason I went to the police is because I heard he was looking for me, and I didn't feel like I had anything to lose if he's looking for me already.

By the rules' own clear language, both MRE 613(b) and MRE 801(d)(1)(A) apply only to prior *inconsistent* statements. Shelby's statements at the preliminary examination were consistent with his statements at trial with respect to this issue.

Defendant also characterizes Shelby's statements at the preliminary examination as statements "regarding identification," and asserts that they should therefore have been admitted under MRE 801(d)(1)(C). We disagree. The statements in question were statements regarding Shelby's motivation for going to the police to share with them the information he had been withholding. They were not statements of identification of a person made after perceiving the person.

Statements Shelby allegedly made to Twiniece Jones, which defendant argues should have been admitted under MRE 801(d)(1)(C), were not statements of identification either. The statements that Shelby allegedly made to Twiniece were statements regarding his alleged inability to see the shooters' faces the night of the shooting. But this type of statement was not "one of identification of a person made after perceiving the person," MRE 801(d)(1)(C); instead it was a statement about Shelby's inability to identify a person, defendant, because he had not perceived that person.

Therefore, the trial court did not abuse its discretion by failing to admit Shelby's prior statement to Twiniece under MRE 801(d)(1)(C).

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that the evidence presented at trial was not sufficient to support the convictions against him. A challenge to the sufficiency of the evidence is reviewed de novo on appeal. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

"The evidence in a bench trial is sufficient if, when viewed in the light most favorable to the prosecutor, a rational factfinder could determine that each element of the crime had been proved beyond a reasonable doubt." *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

On appeal, defendant does not deny that the alleged crimes occurred. Instead, defendant argues that the evidence was insufficient to prove beyond a reasonable doubt that he was one of the gunmen involved, primarily arguing that Shelby's testimony identifying him as one of the gunmen was not credible. The credibility of identification testimony is a question for the trier of fact that this Court does not resolve anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). This Court has stated that positive identification by witnesses may be sufficient to support a conviction. *Id.*

Shelby's testimony alone, that he recognized defendant immediately before the shooting began, and withheld information from the police because he was afraid, would be sufficient to establish that defendant was one of the shooters if a factfinder chose to believe it.

Furthermore, there was evidence that defendant was in the area of the shooting at the time of the offense. Aaron Garcia, a United States Marshal who located and arrested defendant, testified that defendant had a cell phone in his possession at the time of his arrest. Joseph Slatalla, Special Agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, provided expert testimony regarding cell tower analysis at trial. Slatalla testified that, based on defendant's cell phone records (and the cell towers providing service to the phone), at time of the shooting, defendant's cell phone was somewhere inside of a geographic region about 1.5 miles in diameter, and that the address where the shooting occurred was within that region. He further testified that the phone moved closer to that area in the half hour before the shooting, and a half an hour after the shooting, the phone was approximately three miles west of where the shooting occurred. This latter location was consistent with other testimony that revealed that, after the shooting, defendant checked into a motel that was located approximately four miles west of the shooting.

Three separate witnesses testified about the vehicle being driven by the gunmen. All three described it as a darker colored — blue, green, or black — van, SUV, or truck. Gwana Walker, with whom defendant lived as of the date of the shooting, testified that defendant owned a "turquoise color" van at that time.

Defendant presented three alibi witnesses at trial, all of whom testified that they had been with defendant at the home of mutual friend. There were multiple inconsistencies between the testimony of those witnesses, however, namely with regard to whom else had been present at the time and the number of people there in general. The trial court expressly found each of the alibi witnesses not credible, and this Court will not interfere with such determinations. See *Davis*, 241 Mich App at 697.

In sum, Shelby testified that he was absolutely certain defendant was one the three men who attacked him. Call data showed that defendant's cellular phone was in the vicinity at the time the shooting occurred. Multiple witnesses describe the gunmen's vehicle as a darker colored (blue, green, or black) truck, van, or SUV, and defendant owned a turquoise van at the time of the incident. Viewed in the light most favorable to the prosecution, the evidence was sufficient for a factfinder to conclude beyond a reasonable doubt that defendant was one of the perpetrators in this case.

IV. STANDARD 4 BRIEF

Defendant raises two additional issues in a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4.

A. AMENDMENT OF INFORMATION

Defendant first argues that the trial court erroneously allowed the prosecution to amend the information and reinstate the original charges against him. This Court reviews a trial court's decision on a motion to amend the information for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes. *Fomby*, 300 Mich App at 48.

A trial court may amend the information pursuant to MCR 6.112(H) at any time in order to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *Unger*, 278 Mich App at 221. "Once a preliminary examination is held and the defendant is bound over on any charge, the circuit court obtains jurisdiction over the defendant." *Id.* In *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998), the Michigan Supreme Court stated:

> Jurisdiction having vested in the circuit court, the only legal obstacle to amending the information to reinstitute an erroneously dismissed charge is that amendment would unduly prejudice the defendant because of "unfair surprise, inadequate notice, or insufficient opportunity to defend."

Furthermore, "[w]here a preliminary examination is held on the very charge that the prosecution seeks to have reinstated, the defendant is not unfairly surprised or deprived of adequate notice or a sufficient opportunity to defend at trial . . . ." *Id.*

Defendant was originally charged with first-degree murder, two counts of assault with intent to murder, and firearms offenses. At the preliminary examination, the district court dismissed the first-degree murder count and one assault with intent to murder count, but bound defendant over on the others. The circuit court subsequently granted a motion to amend the information to reinstate the two counts that had been dismissed by the district court.

Therefore, under the bright-line rule of *Goecke*, defendant was not prejudiced, and the trial court did not abuse its discretion by allowing the prosecution to amend the information and reinstate the charges dismissed by the district court.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant lastly argues that he was denied the effective assistance of counsel at trial due to defense counsel's failure to (1) interview various individuals before trial or properly prepare his case for trial in general or (2) call expert witnesses in the areas of cell towers and eyewitness identification. Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews findings of fact for clear error and questions of law de novo. *Id*.

To prove he was denied the effective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Defendant did not move for a new trial or an evidentiary hearing in the trial court and did not seek a remand from this Court for either purpose; therefore, this Court's review is limited to the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim then he has effectively waived the issue." *Lockett*, 295 Mich App at 186 (quotation marks omitted).

Hence, because the claimed deficiencies regarding defense counsel's preparation for trial are not apparent from the record, defendant has waived the issue.

Defendant first claims defense counsel was ineffective for failing to properly investigate and prepare his case for trial. Specifically, defendant alleges that defense counsel failed to interview and produce many potential witnesses before trial. However, it is not apparent from the record whether defense counsel interviewed these individuals in preparation for trial or what the testimony of these witnesses would have been. Accordingly, it is impossible for this Court to review whether counsel was ineffective for failing to produce these witnesses, and the issue is waived. See *id.*

Defendant also argues that testimony from an identification expert regarding the reliability of eyewitness testimony, had it been introduced at trial, might have made a difference in the outcome of his case.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defense counsel is given wide discretion in matters of trial strategy; there is a strong presumption of effective counsel when it comes to questions of trial strategy. *Odom*, 276 Mich App at 415. This Court has stated that it will not second-guess matters of trial strategy, nor will it use the benefit of hindsight when assessing counsel's competence. *Id.* Failure to call or question witnesses, or to present other evidence, can constitute ineffective assistance of counsel, but only when it deprives the defendant of a substantial defense. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

At trial, Shelby testified he was absolutely certain that defendant — whom Shelby had known most of his life — was one of the gunmen. The trial court found that the evidence established as much. Considering that defendant was tried without a jury, testimony from an expert witness about the fallibility of eyewitness identifications in general would most likely not have changed that finding by the trial court. Defense counsel's failure to call an identification expert to testify did not deprive defendant of any substantial defense, and his claim of ineffective assistance of counsel fails.

Defendant next argues that defense counsel should have called his own expert to testify on the matter of cell phone towers because the expert would have been able identify inconsistencies in the data. However, there is nothing in the record to indicate what the substance of this expert witness's testimony would have been. Moreover, defendant does not specify what type of inconsistencies might have been revealed and does not address what impact they might have had on the outcome of the trial. Accordingly, because defendant has failed to show how calling a second cell tower expert to testify would have made a difference in the outcome at trial, the issue is effectively waived. See *Lockett*, 295 Mich App at 186.

Defendant has not shown that his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms or that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. Therefore, he has not established that he received ineffective assistance of counsel.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto